

PROVINCE OF LOWER-CANADA.

Court of Appeals.

NOVEMBER SESSION, 1830.

ANTOINE SIMARD,

APPELLANT;

AND

JOSEPH GONTIER and WIFE,
RESPONDENTS.

APPELLANT'S CASE.

*Filed 14 Nov. 1830
L.M.*

A. STUART, for Appellant.

PROVINCE OF LOWER-CANADA.
Court of Appeals.

ANTOINE SIMARD,
(Defendant and Opponent in the Court below,) APPELLANT ;

AND

JOSEPH GONTIER AND WIFE,
(Plaintiffs in the Court below,) RESPONDENTS.

APPELLANT'S CASE.

On the 1st of June, 1819, the Sheriff of the District of Quebec returned into the Court of King's Bench, a Writ of Execution, which had previously issued at the instance of the above named Respondent, against the goods and chattels, lands and tenements of the Appellant in this cause, with an opposition *à fin d'annuler* on the part of the Appellant, to the said opposition annexed.—The grounds of opposition were the following—viz :

That after the making and rendering of the final judgment in the said cause between the said parties and before the issuing of the writ of execution, against the goods and chattels, lands and tenements of him the said Appellant, to wit, at Quebec, he the Appellant, fully paid and satisfied unto them the said Respondents, the amount of the said judgment, rendered in the said cause between the said parties, on the seventeenth day of June, one thousand eight hundred and eighteen, together with all costs and interest due thereon.

That no legal seizure had been made by the Sheriff of the District, of the goods and chattels by the said Sheriff seized and taken in execution in the said cause, and that the formalities required by the law of the land to be by the said Sheriff observed, previous to the making of any seizure whatsoever, had not been by him the said Sheriff observed.

That before the making of the said pretended seizure no *commandement de payer* was by the said Sheriff, nor by the said Respondents, nor by any person or persons on his or their behalf, made or notified to him the said Appellant.

That no Inventory in the manner and form required by the law of the land, was by the Sheriff made.

That no Copy of an Inventory of the effects belonging to the said Appellant, by the said Sheriff alleged or pretended to have been seized, was by him the said Sheriff left with or notified to the said Appellant.

And further that in the said alleged and pretended seizure the law of the land had been wholly and altogether neglected and contravened.

On the 5th February, 1820, the Respondents filed a defense *au fonds en fait* to the above opposition, alleging that the allegations, matters and things therein set forth and contained, were wholly and altogether unfounded in fact and untrue.

On the same day, it was ordered on motion of the Respondents' counsel that the Appellant should reply to the said *defense au fonds en fait* within two days.

And on the seventeenth day of the same month of February, the Court below on motion of the said Respondents' counsel dismissed the said opposition with costs, the said Appellant having neglected, (as it is in the said motion alleged) to file a replication to the plea filed by the said Respondents, in the said cause.

From the above rule or order for the Appellant to reply to the said plea within two days from the making thereof, and from the judgment dismissing the said opposition the present appeal has been instituted, because the same were made and rendered contrary to the express letter of the Rules of Practice of the said Court, and because the Court below thereby deprived the Appellant of an opportunity of proving the allegations, matters and things, in the said opposition contained, and also of the right of obtaining a legal adjudication upon the merits thereof.

By the Section 9, Art. 2, of the Rules of Practice of the Court below, the several motions therein enumerated, are deemed and taken to be motions requiring no previous notice. But by Art. 3, of the same section, it is ordered, "that all motions not herein-before enumerated, previous notice shall, in every case, be given by the party or parties making such motion to the opponent or opponents in such case, of the party or parties making such motion, (if such there be) in the form prescribed in the appendix to these rules and orders, under the number L : and that service of every such notice be made by the space of one day at least before the day appointed by such notice for the making of such motion : and if any such motion shall be made without an affidavit or certificate of the service of such notice, in the manner hereby required, such motion shall not be received or filed."

The motions of the Respondents, to reply to the plea filed by them in the said cause, and to dismiss the Appellant's opposition in consequence of his not having done so, (being non-enumerated motions, and their consequences so highly penal) could therefore only have been made after notice given in the manner required by the said rule or order.

A. J. M.

Cas de L'intimé

L'intimé demandeur en cours inférieure avait obtenu Jugement pour une somme considérable contre l'appellant défendeur en cours inférieure.

L'intimé ne pouvant obtenir paiement a lué un writ d'execution.

L'appellant ne voulant ni payer ni laisser vendre ses biens pour le paiement d'une juste dette, a eu recours au moyen d'une opposition à son exécution.

Cette opposition retournée est combattue par l'intimé qui fit une défense en fait et mit le défendeur opposant à une rigide de leur de répliquer sous 2 jours, à la dite dé.

L'opposant refuse ou néglige de le faire et le demandeur a été contraint de demander que la dite opposition fut en conséquence déboutée, ce que la Cour lui a accordé par son Jugement du 17 Janvier dernier.

Le Merite de l'opposition & des Moyens d'opposition ne sont nullement en question devant cette Cour.

L'unique question en cet appel se réduit à celle-ci "L'opposant Inhibiteur d'il de sa Négligence & s'il ne se pas moqué, aura-t'il le droit de suspendre l'exécution des Jugements des Cours de loi en ce pays à sa volonté & sans aucune raison plausible?"

Les Moyens d'appel sont généraux - Les réponses générales -

Amherst 10. Novembre 1822.

L. Demandeur.

J. L. Intimé.

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à sa volonté
- Les réponses
1822.
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